And at page 815 of *Mitra* under the heading "Scope":

"An inquiry cannot be directed under this section *before* the magistrate takes cognizance of an offence — *Shoukatmal*, 14 Cr. L.J. 600."

The matter does not however rest there.

There is a passage at page 818 of *Mitra* where the learned author says:

"Where an investigation has already been made by the police and witnesses have been examined by the investigating police-officer, the magistrate can merely look into the police papers for the purpose of ascertaining the truth or falsehood of the complaint. This section does not contemplate any particular form of inquiry; and so if upon looking into the public papers the magistrate is satisfied that this is not a fit case in which process should issue, he can dismiss the complaint — *Ramanand* v. *Ali Hassan*, 26 Cr. L.J. 129(131) (Pat)."

I think it may be useful for the present purpose to read in full a passage in the judgment of *Ramanand* v. *Ali Hassan*[3] at page 131:

"It is open to the magistrate to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. In the present case an investigation had been made by the police and witnesses had been examined by the investigating police officer, and there was nothing in law to prevent the sub-divisional magistrate from looking into those papers for the purpose of ascertaining the truth or falsehood of the complaint. The enquiry contemplated by section 202 is not limited to any particular form of enquiry and if upon looking into the police papers, the learned sub-divisional magistrate was satisfied that it was not a fit case in which process ought to be issued against the accused person, I see nothing wrong in law in magistrate doing so."

Similarly *Sohoni's* The Code of Criminal Procedure (16th Edn.) Vol II at page 1270 commenting on section 203 of Indian Criminal Procedure Code said under *II-Competency of Courts to dismiss Complaints Note 21 at page 1277*:

"The magistrate has to form his own conclusions regarding the question of *prima facie* case after consideration of the statement on oath of complainant and where the matter has been referred to the police for the enquiry, the police report as well. *Pramatha Nath* v. *Saroj Nandan*, A.I.R. 1962 S.C. 876."

Here we have a situation where the police investigations had been completed before the complaint before the magistrate was launched. That there is nothing in law to prevent the magistrate from looking into those papers, is clearly demonstrated by the case of *Ramanand* v. *Ali Hassan*.

A number of points were taken in the notice of appeal, some of which in my opinion really raised in slightly different forms of the same point, namely that the learned magistrate took into consideration information irregularly obtained from the police.

In my view, there is neither substance nor merit whatsoever in the other grounds.

The magistrate in his order dismissing the complaint has considered all the materials which he had to consider. After going through the record I am clearly of opinion that there is nothing improper in the order passed by the magistrate. I am satisfied that the magistrate has formed his own conclusions regarding the question of *prima facie* case after due consideration of the statement of the complainant whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against Dr. Fozdar.

The learned magistrate has given his reasons (with which I agree) for coming to his conclusions, and in my view this complaint was rightly dismissed.

I do not think under the circumstances of this case there are adequate grounds for interfering with the order of the learned magistrate, and I dismiss this appeal.

Appeal dismissed.

CHIN HUA SAWMILL CO. SDN. BHD. v. TUAN YUSOFF BIN TUAN MOHAMED

[F.C. (Tun Azmi L.P., Suffian and Ali F.JJ.) August 10, 1973]
[Kuala Trengganu — Federal Court Civil Appeal No. 28 of 1973]

Practice and Procedure — Failure to serve notice of appeal within prescribed period — Applicant precluded from appealing unless special leave given — Federal Court (Civil Appeals) (Transitional) Rules, 1963, rr. 7, 13 and 73.

In this case judgment against the applicant had been pronounced on February 1, 1973. Notice of appeal was filed by his solicitors on February 14, 1973 but the notice of appeal was not served on the respondent till May 27, 1973.

Held: (1) failure to serve the notice of appeal on the respondent within the prescribed period of one month precluded the applicant from appealing unless special leave of the court was given;

(2) in the circumstances of this case as the failure to serve the notice was due to the solicitor's mistake, there was no ground for granting special leave.

Cases referred to:-

(1) *Gurbachan Singh* v. *Seagrott and Campbell (No. 2)* [1962] M.L.J. 370.

(2) *Christopher* v. *Croll* (1885) 16 Q.B.D. 66.

FEDERAL COURT.

A. Wilson for the appellant

Datuk Wan Mustapha for the respondent.

Ali F.J. (delivering judgment of the Court): This notice of motion for an order to extend the time to serve the notice and record of appeal on the respondent was dismissed on the date of hearing June 11, 1973. We now give our reasons.

The judgment against the applicant was pronounced in the High Court at Kota Bharu on February 1, 1973. On February 14, 1973 his solicitors filed a notice of appeal in the Registry of that Court. But it was not served on the respondent until May 27, 1973. In view of rule 13 of the Federal Court (Civil Appeals) (Transitional) Rules 1963 which prescribes the time limit for bringing an appeal, it is clear that the respondent was not served with the notice within the prescribed time of one month. The question is whether this precludes the applicant from appealing. The same question arose in *Gurbachan Singh* v. *Seagrott & Campbell (No. 2)*.[1] The then Court of Appeal considered rules 1A(1), 2 and 15 of Order 58 of the Rules of the Supreme Court, 1957 which are respectively identical in terms as rules 6(1), 7 and 13 of the Federal Court (Civil Appeals) (Transitional) Rules, 1963, hereinafter referred to as the 1963 Rules. Thom-

son C.J. (as he then was) delivering the judgment of the Court of Appeal had no hesitation in following the decision in the case of *Christopher* v. *Croll*[2] in the construction of rule 15 of Order 58 which is equivalent to rule 13 of the 1963 Rules. He referred to a passage from the judgment of Lord Esher, M.R. which reads thus:

"Rule 1 of Order LVIII says that 'all appeals should be brought by notice of motion', and rule 15 provides that no appeal from a final judgment in an action shall be 'brought' after the expiration of a year. This seems to show that the appeal is 'brought' when the notice of appeal is served on the respondent."

Similarly in this case the mere filing of the notice of appeal is not sufficient compliance with rule 13. It must also be served on the respondent as required by rule 7 and failure to do so within one month precludes the applicant from appealing unless special leave of the full court is given under rule 13.

It is necessary to consider whether special leave should be given in this case. The affidavit in support of the notice of motion is that of Mr. Foo Say Ghee, the applicant's solicitor. In paragraph 16 Mr. Foo Say Ghee said that from February 9, 1973 until March 26, 1973 he was not in a proper and normal state of mind to conduct his office work. This was because he was personally involved in matters which have nothing to do with the applicant's case. In such a state of mind he said he inadvertently omitted to instruct his staff to serve the notice on the respondent or the respondent's solicitors. Here is a clear admission that the failure to serve the notice was due to the solicitor's mistake. Needless to say that such mistake is not a ground for granting special leave. That must be so for the obvious reason that it is not possible to draw a dividing line between a mistake which can support the exercise of a discretionary power and that which cannot. A mistake is a mistake whatever may be the reason for it. As to whether or not Mr. Foo's mistake amounts to negligence we express no opinion.

Mr. Wilson who argued this motion has submitted that this is not a case in which special leave is required. What we have said earlier regarding rules 7 and 13 of the 1963 Rules is sufficient to show that special leave is required. Counsel was apparently of the view that rule 73 of the 1963 Rules or rule 7 of Order 64 of the Rules of the Supreme Court which gives the court power to enlarge time is to be read independently of rule 13 so that the failure to serve the notice in this case can be looked upon as a mere irregularity which can be cured simply by payment of costs. We do not agree for the reasons already stated.

Lastly, the point was taken that the respondent has not been prejudiced by the failure to serve the notice. See paragraph 25 of the affidavit. It is true that as early as February 14, 1973 the respondent's solicitors were informed by letter that the notice of appeal was being filed in the court and that a copy would be served. But in our view the mere sending of the letter is not enough. Rule 6(3) of the 1963 Rules provides that the notice of appeal shall substantially be in Form I. Rule 7 requires the notice to be served and rule 32(1) prescribes the mode of effecting such service. In view of these rules we must say that the point was not well taken.

For the reasons stated the application for extension of time was refused.

Order accordingly.

Solicitors: *Foo Say Ghee & Co.; Wan Mustapha & Co.*

TRIPTIPAL SINGH v. PUBLIC PROSECUTOR

[A.Cr.J. (Chang Min Tat J.) November 24, 1973]
[Penang — Criminal Appeal No. 54 of 1973]

Criminal Law and Procedure — Charge of using threatening, abusive and insulting words whereby a breach of the peace was likely to be occasioned — Whether charge bad for duplicity — Contradictions and discrepancies in evidence — Matter of credibility for trial judge — Minor Offences Ordinance, 1955, s. 14.

In this case the appellant had been convicted on a charge of using threatening, abusive and insulting words on a police officer whereby a breach of the peace was likely to be occasioned, an offence under section 14 of the Minor Offences Ordinance, 1955. On appeal it was argued (a) the charge was bad for duplicity; and (b) that in view of the contradictions and discrepancies in the evidence of the complainant he was not a witness worthy of credit, on whose evidence it would be safe to found a conviction.

Held: (1) section 14 of the Minor Offences Ordinance 1955 creates one offence, that of conduct tending to provoke a breach of the peace. The charge in this case was not bad for duplicity;

(2) the question in regard to contradictions and inconsistencies in the evidence was basically one of credibility and was essentially one for the trial judge. The appeal court could not therefore interfere with the decision of the trial judge.

Cases referred to:-

(1) *Vernon* v. *Paddon* [1973] 1 W.L.R. 663.
(2) *Reg.* v. *Clow* [1965] 1 Q.B. 598.
(3) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.
(4) *R.* v. *Panayiotou* [1973] 3 All E.R. 112 at p. 117.

CRIMINAL APPEAL.

Lim Ewe Hock for the appellent.

T. Selvanthiranathan (Deputy Public Prosecutor) for the respondent.

Chang Min Tat J.: The appellant was at the conclusion of his trial at the Sessions Court in Penang convicted on the following alternative charge:

"That you on the 9th of March, 1972 at about 3.15 p.m. at the ground floor of Police Headquarters, Penang Road, in the District of Georgetown, in the State of Penang, did use threatening, abusive and insulting words on A.S.P. Ariffin bin Hj. Mohd. Aris to wit by uttering the words:

'Shut up, don't talk about section 127A to me. I demand to see my client or else I will take up this matter.' 'You are trying to be funny, one of these days I will see that you get sacked from the Police Force,' 'You tap my client, I will sue you in court, I know that you have been beating up my client.'

Whereby a breach of peace was likely to be occasioned and you have thereby committed an offence punishable under section 14 of the Minor Offences Ordinance No. 3 of 1955."

and fined $50 in default 1 month's imprisonment. The fine was paid. The appeal was from the conviction.

A first ground of appeal was that the charge was bad for duplicity. An objection to this charge on this ground was taken at the commencement of the